

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs December 15, 2009 at Knoxville

**REGINALD C. MALONE, SR. v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Rutherford County**  
**No. F-59386 Robert E. Corlew, III, Judge**

---

**No. M2009-01881-CCA-R3-PC - Filed January 4, 2010**

---

The petitioner, Reginald C. Malone, Sr., appeals from the Rutherford County Circuit Court's summary dismissal of his timely petition for post-conviction relief. Upon our review, we reverse and remand to the circuit court for a hearing on the issues of ineffective assistance of counsel and the alleged withholding of exculpatory evidence.

**Tenn. R. App. P. 3; Judgment of the Circuit Court Reversed and Remanded**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Reginald C. Malone, Sr., Nashville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel West Harmon, Assistant Attorney General; and William C. Whitesell, Jr., District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The petitioner was convicted of selling .5 grams or more of cocaine as a result of a 2006 controlled drug purchase wherein the police used a confidential informant. *See State v. Reginald C. Malone*, No. M2008-02880-CCA-R3-CD, slip op. at 2-3 (Tenn. Crim. App., Nashville, Nov. 4, 2008), *perm. app. denied* (Tenn. 2009). On appeal from that conviction and on a consolidated appeal from the denial of coram nobis relief, the petitioner claimed that the trial court erred in admitting evidence under Tennessee Rule of Evidence 404(b), that the prosecutor engaged in misconduct during oral argument, that the convicting evidence was legally insufficient, that the trial court erred in aligning his sentence consecutively to a sentence in a previous case, and that a writ of error coram nobis should be issued on the basis of newly discovered evidence concerning the weight of the cocaine sold. *See id.*

Adjudicating that appeal, this court held that the evidentiary issue and the prosecutorial misconduct issue were waived because the motion for new trial was not timely filed. *See id.*, slip op. at 4. The court also held that the convicting evidence was legally sufficient. *See id.*, slip op. at 5. Because the trial record did not support the trial court's finding that the petitioner was on probation when he committed the offense at issue, this court reversed the consecutive alignment of sentences and ordered the new sentence to run concurrently with the previous sentence. *See id.*, slip op. at 7. Concerning the petitioner's coram nobis complaint that the confidential informant's testimony that more cocaine was recovered from the confidential informant than was quantified by the Tennessee Bureau of Investigation (TBI) laboratory, this court noted that "[t]he fact that the weight of the cocaine as shown by the [petitioner's] scales was not identical to the weight of the cocaine as shown by the TBI crime laboratory's scales was established by the proof introduced at trial" and concluded that the "information [was] not 'newly discovered evidence.'" *Id.*, slip op. at 8. This court further noted that "no objection was made at trial based upon insufficient proof of the chain of custody," and we "conclude[d] that the trial court did not err by denying the writ of error coram nobis." *Id.*

On August 12, 2009, the defendant filed a timely post-conviction petition that is now at issue. The petitioner alleged that the State withheld exculpatory evidence and that his trial counsel provided ineffective assistance through failing to file a pretrial motion to suppress evidence and failing to raise a contemporaneous objection to an improper chain of custody of evidence. The post-conviction court summarily dismissed the petition based upon its holding that the issues raised in the petition had been previously determined.

If a post-conviction petition alleges facts that, taken as true, fail to show that "the claims for relief have not been waived or previously determined, the petition shall be dismissed." T.C.A. § 40-30-106(f).

A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

*Id.* § 40-30-106(g). "A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." *Id.* § 40-30-106(h). "A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence." *Id.*

In the present case, the State concedes that the issues of ineffective assistance of counsel raised in the post-conviction petition have not been determined by any court. We agree.

The State also posits that the issue of withholding exculpatory evidence may have been waived, depending upon whether “the factual predicate was known at the time the petitioner filed his direct appeal,” and the State does not claim that this issue was previously determined.

Given the State’s concession, which we find apt, we reverse the order of the trial court and remand the case for that court to appoint counsel and conduct an evidentiary hearing on the issues of ineffective assistance of counsel and whether the withholding exculpatory evidence issue has been waived or previously determined.

---

JAMES CURWOOD WITT, JR., JUDGE